UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MARQUEZ BROTHERS ENTERPRISES, INC.

and Cases 21-CA-039581

ALFONSO MARES

and 21-CA-039609

JAVIER AVILA

ORDER[1]

The General Counsel's request for special permission to appeal Administrative Law Judge Lisa Thompson's ruling prohibiting the General Counsel from questioning any witnesses other than the compliance officer concerning the discriminatees' interim earnings is granted, and on the merits, the appeal is granted. The judge based her ruling on her determination that the discriminatees had failed to fully comply with the subpoenas duces tecum issued to them, which sought documents regarding their interim earnings and efforts to mitigate the Respondent's backpay liability by seeking other employment. We find that the judge abused her discretion by ordering an unduly harsh evidentiary sanction against the General Counsel based on the discriminatees' failure to fully produce responsive documents.

The General Counsel is not the representative of the discriminatees in this proceeding. "Once a charge is filed, the General Counsel proceeds, not in vindication of private rights, but as the representative of an agency entrusted with the power and

[1] The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

duty of enforcing the Act in which the public has an interest . . . ." *Alberici-Fruin-Colnon*, 226 NLRB 1315, 1316 (1976). In addition, "a backpay remedy is not a private right but is a public right granted to vindicate the policies of the Act." *State Journal*, 238 NLRB 388 (1978); accord *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263 (1969); see also *Trinity Valley Iron & Steel Co. v. NLRB*, 410 F.2d 1161, 1168 (1969) (backpay proceeding vindicates a public right to deter unfair labor practices; "employee is but a beneficiary"). Therefore, we find that the judge improperly penalized the General Counsel for conduct that he did not control.[2]

We further find that the sanction imposed by the judge was unduly harsh. As we stated in *Sisters Camelot*, 363 NLRB No. 13, slip op. at 8-9 (2015), "[t]he Board is

[2] Contrary to our dissenting colleague, we do not find that sanctions against the General Counsel are appropriate in response to the failure of individual discriminatees to fully comply with subpoenas duces tecum issued to them, or that foregoing such sanctions in favor of pursuing other means of obtaining the relevant evidence represents a "reward." As the cases cited above demonstrate, it is well established that the General Counsel is not advancing the interests of the discriminatees, but rather advancing the policies of the Act in order "to prevent the violator from profiting from his misdeeds." *Trinity Valley*, supra at 1168. In the circumstances of this case, in which the discriminatees are proceeding pro se, one of them lacks reasonable proficiency in English, and both were willing to and did testify about their production of documents and attempts to comply with the subpoena requests, we find that precluding the General Counsel from establishing his case would seriously undermine the Act's objectives. Furthermore, in suggesting that the General Counsel represents the interests of the discriminatees in backpay proceedings, our colleague fails to identify any principled distinction between that stage and any other aspect of unfair labor practice litigation, and we find no basis for such a distinction. In our view, such an approach misconstrues the role of the General Counsel, as set forth in the above precedent.

In addition, we find that *Prime Healthcare Services-Encino, LLC d/b/a Encino Hospital Medical Center*, 364 NLRB No. 128, slip op. at 18 fn. 39 (2016), relied on by the judge, is distinguishable. There, based on the represented charging party union's contumacious failure to comply with the respondents' subpoenas duces tecum, the judge precluded both the union and the General Counsel from cross-examining the respondents' witnesses or presenting contrary evidence regarding a defense asserted by the respondents. In addition, the propriety of the imposition of the sanction was not raised on exceptions before the Board, and therefore the case has no precedential weight concerning that issue. See *Whirlpool Corp.*, 337 NLRB 726, 727 fn. 4 (2002).

careful not to impose drastic sanctions disproportionate to the alleged noncompliance. See, e.g., *Teamsters Local 917 (Peerless Importers*), 345 NLRB 1010, 1011 (2005) (reversing judge's dismissal of the complaint as sanction for party's noncompliance with subpoena, due to its harshness and 'perhaps unprecedented' nature and the availability of lesser sanctions)." See also *Toll Mfg. Co.*, 341 NLRB 832, 836 (2005).

Here, the discriminatees failed to produce all of the responsive documents at the beginning of the hearing as required, but after questioning by the judge, they produced additional evidence, and indicated that other responsive documents exist, but were not in their possession. The discriminatees were unrepresented by counsel, and there is no indication that their failure to comply fully with the subpoenas was willful. See *Sisters Camelot*, supra, slip op. at 8. The General Counsel, moreover, provided the Respondent the documents that the compliance officer relied on in calculating the discriminatees' backpay. Although we are cognizant of the importance of the subpoenaed documents to the Respondent's case, we find that in the circumstances here, the preclusion sanction imposed by the judge was disproportionately severe, and we urge the judge to consider different measures to ensure a complete record, including permitting the General Counsel to elicit testimony from the discriminatees regarding their interim earnings and permitting the discriminatees additional time in which to obtain those documents that exist, but are not currently in their possession.[3]

[3] As our dissenting colleague points out, these alternative approaches include measures that do not constitute sanctions, but that we believe could be effective in obtaining the necessary evidence in order to effectuate the purposes of the Act. It is not uncommon for evidence regarding interim earnings to be elicited through the testimony of the discriminatees. See, e.g., *Allegheny Graphics, Inc.*, 320 NLRB 1141, 1146 (1996) (judge reduced backpay based on discriminatee's credible testimony that certain interim earnings were omitted from compliance specification due to oversight by

Dated, Washington, D.C., September 7, 2017

MARK GASTON PEARCE, MEMBER

LAUREN McFERRAN, MEMBER

Chairman Miscimarra, dissenting in part:

I agree with my colleagues' decision to grant the General Counsel's request for special permission to appeal Administrative Law Judge Lisa Thompson's ruling prohibiting the General Counsel from questioning any witnesses other than the compliance officer concerning the discriminatees' interim earnings. On the merits, however, I disagree with my colleagues. I believe the preferred course when parties fail to comply with a subpoena is to have the subpoena enforced by a court, which is expressly empowered under Sec. 11(2) of the Act to punish failures to comply with court-enforced subpoenas by finding non-complying individuals or entities in contempt. See, e.g., *McDonald's USA, LLC*, 364 NLRB No. 144, slip op. at 4 (Member Miscimarra, dissenting) (2016).

However, for several reasons, I disagree with my colleagues' finding that the judge abused her discretion in the instant case.

First, I believe the Board cannot reasonably find that the judge engaged in an abuse of discretion in the circumstances presented here: where employee-claimants have failed to respond appropriately to valid subpoenas seeking documents pertaining to the employees' interim earnings, their efforts to secure employment, and related matters bearing on backpay and possible offsets or reductions from backpay.

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compliance officer). Further, such testimony is subject to cross examination and credibility determinations by the administrative law judge.

Second, I strongly disagree with my colleagues' suggestion that—when faced with the employee-claimants' failure to respond appropriately to the subpoenas—it is an appropriate "sanction" for the judge to simply have the General Counsel "elicit testimony from the discriminatees regarding their interim earnings." When employee-claimants have failed to provide subpoenaed documents bearing on interim earnings, it is a reward—not a sanction—to permit the non-complying parties to substitute oral testimony, elicited by the General Counsel who is acting on behalf of such parties, regarding the very same matters about which the parties have failed or refused to provide subpoenaed documents.

Third, I believe my colleagues cannot reasonably find that the General Counsel has immunity from being on the receiving end of sanctions associated with subpoena non-compliance by employee-claimants. After all, regarding questions about backpay, interim earnings and potential offsets or reductions, the interests of the employee-claimants, obviously, are being advanced by the General Counsel. More generally, in *King Soopers, Inc.*, 364 NLRB No. 93 (2016), I warned that the Board majority's expansion of remedies recoverable by employee-claimants would likely produce more "contentious disputes" in cases involving disputed backpay. Id., slip op. at 15 (Member Miscimarra, concurring in part and dissenting in part). Everyone having an interest in such disputes should be held to the same standard when it comes to requiring compliance with subpoenas regarding relevant documents.

For these reasons, as to this issue, I respectfully dissent.

Dated, Washington, D.C., September 7, 2017

PHILIP A. MISCIMARRA, CHAIRMAN